KETUA PENGARAH HASIL DALAM NEGERI
v. GENTING MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
MOHD NAZLAN GHAZALI JCA
CHOO KAH SING JCA
[CIVIL APPEAL NO: W-01(A)-449-08-2021]
16 JANUARY 2025

Abstract – *(i) For a court to exercise its judicial review power, there must be a 'decision' made by a decision-maker or a refusal by the decision-maker to make a decision. This decision must affect the aggrieved party by altering their rights or obligations or depriving them of benefits they are entitled to. A mere forwarding of information or a letter from another entity, as in this case, does not constitute a 'decision' that is amenable to judicial review, pursuant to O. 53 r. 2(4) of the Rules of Court 2012 ('ROC'). Similarly, a 'request' for information is not equivalent to a 'decision' that can be challenged through judicial review; (ii) As provided under O. 53 r. 3(6) of the ROC, applications for judicial review must be made promptly within three months from when the grounds for the application first arose or when the decision was first communicated to the applicant. If a judicial review application is filed outside this three-month window, the court lacks jurisdiction to grant leave or hear the application.*

ADMINISTRATIVE LAW: *Judicial review – Challenge against letters and requests – Membership of rewards loyalty programme at company's resort – Membership application form contained personal information of customers – Requests by Director General of Inland Revenue ('DGIR') for information on owners of membership card – Requests rejected by company – DGIR forwarded letter by Department of Personal Data Protection ('DPDP') confirming that company may disclose customers' personal data as DGIR authorised to request for such information – Company commenced judicial review against DGIR and Commissioner and Deputy Commissioner of DPDP – Whether there was decision by decision-maker – Whether there was refusal by decision-maker to make decision – Whether decision affected aggrieved party – Whether altered aggrieved party's rights or obligations or deprived benefits – Whether letters and requests constituted 'decision' – Whether amenable to judicial review – Rules of Court 2012, O. 53*

LIMITATION: *Judicial review – Challenge against letters and requests – Membership of rewards loyalty programme at company's resort – Membership application form contained personal information of customers – Requests by Director General of Inland Revenue ('DGIR') for information on owners of membership card – Requests rejected by company – DGIR forwarded letter by Department of Personal*

Data Protection ('DPDP') confirming that company may disclose customers' personal data as DGIR authorised to request for such information – Company commenced judicial review against DGIR and Commissioner and Deputy Commissioner of DPDP – Whether application for judicial review made within time frame stipulated in O. 53 r. 3(6) of Rules of Court 2012 – Whether court seized with jurisdiction to grant leave or to hear substantive judicial review application

The respondent operated an integrated resort business. Customers of the resort were eligible to apply for membership of the resort's rewards loyalty programme by filling up the membership application form with their personal details. Dispute arose when the appellant made requests for the information on the respondent's customers' personal data. The respondent rejected these requests. The officers from the Lembaga Hasil Dalam Negeri ('LHDN') then visited the respondent's premises and explained the purpose and importance of the personal data to the LHDN and the relevant laws applicable to the respondent. To ensure that the respondent's interest was protected, the respondent inquired whether the appellant could obtain a confirmation letter from the Department of Personal Data Protection ('DPDP') as to whether the respondent was allowed to disclose the personal data to LHDN and that to do so would not be in breach of the Personal Data Protection Act 2010 ('PDPA'). The appellant duly wrote to the DPDP. The DPDP issued a letter, confirming that the respondent may disclose the customers' personal data as such disclosure was allowable pursuant to s. 39(b)(ii) of the PDPA, based on s. 81 of the Income Tax Act 1967, which authorised the appellant to request for such information ('DPDP's letter dated 8 November 2019'). The DPDP's letter dated 8 November 2019 was forwarded by the appellant to the respondent *via* an email ('appellant's email dated 12 November 2019'). The respondent disagreed with the contents of the DPDP's letter and wrote to the DPDP to express the same. In its reply, the DPDP reiterated that the respondent may disclose the personal data to the appellant ('DPDP's letter dated 29 January 2020'). The respondent then initiated an application for judicial review at the High Court, against the Commissioner and the Deputy Commissioner of the DPDP and the appellant, to quash: (i) the letters issued by the DPDP; and (ii) the appellant's email dated 12 November 2019 which forwarded the DPDP's letter dated 8 November 2019. The High Court: (i) quashed the DPDP's letters dated 8 November 2019 and 29 January 2020 and declared them invalid and unlawful; (ii) quashed the appellant's decision communicated in the email dated 12 November 2019, which conveyed the DPDP's decision, and declared the same to be invalid and unlawful; and (iii) declared the appellant's requests, through his letters to the respondent issued in 2018 and 2019, for the respondent to disclose its customers' personal data, to be invalid. Hence, the present appeal by the appellant. The issues that arose for determination were, *inter alia*: (i) whether the appellant's email dated 12 November 2019 was a decision that was reviewable; and (ii) whether the judicial review application was filed out of time.

Held (allowing appeal with costs; setting aside decision of High Court against appellant)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) In order to invoke the judicial review powers of the court, pursuant to O. 53 r. 2(4) of the Rules of Court 2012 ('ROC'), there must first be a decision by a decision-maker, *ie*, the appellant, or a refusal by him to make a decision and that decision must affect the aggrieved party, *ie*, the respondent, by either altering his rights or obligations or depriving him of the benefits which he had been permitted to enjoy. The email that the respondent was seeking to impugn, *ie*, the appellant's email dated 12 November 2019, was an email that was merely enclosing or forwarding a letter from the DPDP for the knowledge of the respondent. By no stretch of the imagination could this forwarding email be a decision that was reviewable under O. 53 of the ROC. Bearing in mind that the email was merely forwarding the letter from the DPDP, the email did not, in any way, affect the respondent, by either altering its rights or obligations or depriving it of the benefits which it had been permitted to enjoy. As such, the said email was not a decision that could be the subject of review under O. 53 r. 2(4) of the ROC. Since there was no decision that could be the subject of review, the High Court committed an appealable error in quashing the notification email issued by the appellant. (paras 41-43 & 45)

(2) A request could not tantamount to a decision which was amenable to judicial review. Since the impugned letters issued in 2018 and 2019 were merely request letters, the letters were not decisions which were amenable to judicial review. Moreover, O. 53 r. 3(6) clearly provides that the application for judicial review shall be made promptly and, in any event, within three months from the grounds of application first arose or when the decision was first communicated to the applicant. Since the respondent was seeking to nullify the letters issued by the appellant in 2018 and 2019, and the latest letter was dated 13 May 2019, these letters were clearly issued more than three months from the date of the judicial review application, which was filed on 7 February 2020. The High Court had no jurisdiction to grant leave or to hear the substantive judicial review application; the application should have been dismissed *in limine*. (paras 54, 57, 59 & 67)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Council Of Civil Service Union & Ors v. Minister For The Civil Service [1985] AC 374 ***(refd)***

Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2016] CLJU 1798; [2016] 1 LNS 1798 HC ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***
Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***
Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***
Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 5 CLJ 153 CA ***(refd)***
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1)
Income Tax Act 1967, ss. 80, 81
Personal Data Protection Act 2010, ss. 8, 39(b)(i), (ii), 45(2)(a)(iii)
Rules of Court 2012, O. 53 rr. 2(2), (4), 3(6)

For the appellant - Normareza Mat Rejab & Syazana Safiah Rozman; Inland Revenue Board of Malaysia
For the respondent - Anand Raj, Irene Yong & Foong Pui Chi & Chantal Leann Barnabas; M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Genting Malaysia Bhd v. Pesuruhjaya Perlindungan Data Peribadi & Ors [2022] 4 CLJ 399 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] The reliefs in the judicial review application that was allowed by the learned judge are as follows:

(i) a *certiorari* to quash the Personal Data Protection Commissioner's decision in his letter dated 8 November 2019 and 29 January 2020 that said the respondent ("Genting") may disclose the customers' information to the Director General, Inland Revenue ("DGIR") pursuant to s. 39(b)(ii) of the Personal Data Protection Act 2010 ("PDPA 2010") and s. 81 of the Income Tax Act 1967 ("ITA 1967") (altogether to be referred as "personal data decision");

(ii) a declaration that the personal data decision (*ie*, the decision of the Commissioner and Deputy Commissioner of PDP) is invalid in law;

(iii) a *certiorari* to quash the DGIR's decision contained and reflected in DGIR's email dated 12 November 2019 to Genting that conveyed the personal data decision (the "impugn decision");

(iv) a declaration that the impugn decision is invalid in law;

(v) a declaration that the demands made by DGIR *via* letters dated 23 November 2018, 8 April 2019, 29 April 2019 and 17 May 2019 and emails dated 12 December 2018 and 12 November 2019 requiring Genting to disclose the customers' personal data ("DGIR's demands") are invalid in law;

(vi) a declaration that the DGIR is bound and cannot disregard the provisions of the PDPA 2010 without the consent of Genting's customers, or reasonable suspicion is shown that an identifiable customer has not complied with any provisions of the ITA 1967 relating to assessment or recovery of tax, or due to a court order for disclosure;

(vii) a declaration that Part V of the ITA 1967 generally, and s. 81 of the ITA 1967 specifically, do not give any power to DGIR to set aside the protection under PDPA 2010 without the consent of Genting's customers, or reasonable suspicion is shown that an identifiable customer has not complied with any provisions of the ITA 1967 relating to assessment or recovery of tax, or due to a court order for disclosure;

(viii) a declaration that the protection under PDPA 2010 generally, and as referred in s. 8 of the PDPA 2010 specifically, requires Genting to reject any requests or demands to disclose any personal data without the consent of Genting's customers, or reasonable suspicion is shown that an identifiable customer has not complied with any provisions of the ITA 1967 relating to assessment or recovery of tax, or due to a court order for disclosure;

(ix) an order of prohibition to prohibit DGIR from taking any steps, enforcement action or proceedings relating to the personal data decision, DGIR's decision and/or the DGIR's demands; and

(x) a declaration that any information or personal data of Genting's customers which are subjected to the laws of privacy or personal data protection in other jurisdictions is excluded from any permissible disclosure without the consent of Genting's customers, or reasonable suspicion is shown that an identifiable customer has not complied with any provisions of the ITA 1967 relating to assessment or recovery of tax, or due to a court order for disclosure.

[2] The appellant, DGIR, has appealed to this court against the decision of the learned judge. However, the first and the second respondents in the High Court, namely the Pesuruhjaya Perlindungan Data Peribadi ("PPDP") and the Timbalan Pesuruhjaya Perlindungan Data Peribadi Jabatan Perlindungan Data Peribadi ("JPDP") have elected not to appeal against the said decision.

[3] As such, in this appeal, we are only dealing with the prayers affecting the DGIR only, namely prayers (iii) to (x) that were granted by the learned judge.

The Salient Facts

[4] Genting is a company incorporated in Malaysia under the Companies Act 1965 on 7 May 1980. It operates an integrated resort business at Genting Highlands, Pahang known as "Resort World Genting" and its principal activities cover leisure and hospitality services consisting of gaming, hotels, food and beverage, theme parks, retail and entertainment attractions.

[5] Subject to Genting's sole discretion and approval, the customers of Resort World Genting ("the customers") are eligible to apply for membership of the Genting rewards loyalty programme ("Genting loyalty programme").

[6] A customer who wishes to become a member of the Genting loyalty programme will fill the membership application form and provide information to Genting, such as name, gender, date of birth, Malaysian identity card number or passport number, address, email address and telephone number.

[7] The said application form contains a "declaration by member" as follows:

> 3. Personal Data Processing Statement (PDPS) I hereby expressly declare that I have read, understood and voluntarily and unconditionally agreed to the terms and conditions stipulated in the Personal Data Processing Statement and hereby consent to the processing of my personal data in the manner described in the personal data Processing Statement.

[8] The material parts of the personal data processing statement ("personal data notice") showed as follows:

(i) paragraphs 3.1(n) had informed the customers the purposes of the data processing, which purpose includes for Genting to discharge its legal obligation.

> Purposes of Processing
>
> 3.1 The Group may use your personal data for the following purposes, namely:

(n) For the Group to discharge obligations required under the law, such as reporting requirements under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and the Registration of Guests Act 1965.

(ii) paragraph 4.2 had also informed the customers that personal data may be shared where it is required by law or disclosure necessary to comply with the law:

Disclosure to Third Parties

4.2 The Group may also share your personal data where required by law or where disclosure is necessary to comply with applicable laws, legal processes or queries from the relevant authorities.

[9] By submitting the duly completed and signed application form, the customers had acknowledged, agreed and consented unconditionally to the processing of the customers' personal data by Genting. (See para. 9 of the Genting's affidavit in support).

History Of DGIR Request For Personal Data

[10] The initial request for information of Genting's customers was put forward by Unit Profiling of Revenue's Duta Branch ("Unit Profiling") from 23 November 2018 to 28 November 2018.

[11] On 7 December 2018, Genting responded by stating that Genting is not a society/club, and in respect of the Genting rewards card, no annual fee is collected from the members.

[12] On 12 December 2018, DGIR explained that the request was for information on the owner of the Genting rewards card.

[13] Genting replied on 24 December 2018 and took the stand that s. 81 of the ITA 1967 only authorised DGIR to request information relating to Genting's tax returns, and not its customer's personal data. Genting also expressed its concern that the disclosure of the customer's information would contravene s. 39 of the PDPA 2010.

[14] On 30 April 2019, Jabatan Perisikan & Profiling ("JPP") of Lembaga Hasil Dalam Negeri ("LHDN") sent a letter dated 29 April 2019 *via* email requesting similar information as the initial request by Unit Profiling, but for the year 2018.

[15] Genting responded *via* a letter dated 13 May 2019, *inter alia*, stated that it would be in breach of s. 39 of the PDPA 2010 if its customer's information is revealed to the DGIR.

[16] On 24 May 2019, DGIR sent a letter dated 17 May 2019 *via* email and informed Genting that DGIR is empowered under s. 81 of the ITA 1967 to request third party information from Genting and that ss. 39(b)(i), 39(b)(ii) and 45(2)(a)(iii) of the PDPA 2010 allows Genting to reveal such information to DGIR.

[17] In response, Genting requested for time to review the request and the extension was allowed by DGIR. *Via* a letter dated 18 July 2019, Genting rejected DGIR's request.

[18] On 4 September 2019, officers from LHDN visited Genting's premise in Genting Highlands, where the following transpired:

(i) both deponents of the Genting's affidavits and DGIR's affidavits were present;

(ii) DGIR explained the purpose and importance of the personal data to LHDN and the relevant laws applicable to Genting;

(iii) Genting's deponent had stated that he understood the provisions of s. 81 of the ITA 1967 but he needed approval from the Board of Directors. He was also concerned that the disclosure of the personal data would expose Genting to legal action from the customers. Genting also raised concerns that LHDN would reveal to the customers that the information was given by Genting;

(iv) DGIR officers explained that according to LHDN's standard operating procedure, there is no guarantee letter to be issued. Nevertheless, Genting was assured that DGIR is obliged not to reveal the source of any of its information; and

(v) thus, to ensure that Genting's interest is protected, Genting had inquired whether DGIR can obtain a confirmation letter from the PPDP as to whether Genting is allowed to disclose the personal data to LHDN and that to do so would not be in breach of the PDPA 2010.

[19] DGIR agreed to write to the PPDP and offered to set up a meeting with the PPDP to discuss the issue. This can be seen from the following correspondences:

(i) on 24 September 2019, Genting had emailed to DGIR that it would like to take up DGIR's offer to discuss the issue with DPDP and Attorney General's Chambers (see exh. "ARS-2");

(ii) pursuant to Genting's request for confirmation from DPDP, DGIR had written to the Commissioner of JPDP on 15 October 2019 (see exh. "ARS-1").

[20] In response to DGIR's letter dated 15 October 2019, PPDP issued a letter dated 8 November 2019 confirming that Genting may disclose the customers' personal data as such disclosure is allowable under s. 39(b)(ii) of the PDPA 2010 based on s. 81 of the ITA 1967 that authorises the DGIR to request for such information (see exh. "WKL-11").

[21] The PPDP's letter was forwarded by DGIR to Genting *via* email dated 12 November 2019.

[22] Genting then disagreed with the contents of PPDP's letter and had written to PPDP *via* letters dated 12 December 2019 and 23 January 2020. PPDP replied *via* letter dated 29 January 2020 and reiterated that Genting may disclose the personal data to DGIR (see: exhs. "WKL-12" and "WKL-14").

[23] Genting then initiated the judicial review application to quash the letters issued by PPDP as well as the email dated 12 November 2019 issued by DGIR, which forwarded the PPDP's letter dated 8 November 2019 to Genting.

Decision Of High Court

Against Commissioner And Deputy Commissioner JDPD

[24] The learned judge has allowed all the prayers in the OS. As against the decision made by the Commissioner and Deputy Commissioner of JPDP in their letters dated 8 November 2019 and 29 January 2020 respectively, the learned judge had quashed the said letters and declared the same to be invalid and unlawful.

[25] The learned judge held that the issue of whether a decision existed had been settled during the leave stage of the judicial review, where it was determined that letters dated 8 November 2019 and 29 January 2020 were decisions that aggrieved the applicant, Genting. No appeal was filed against the granting of leave to commence judicial review proceedings. As such, the learned judge held that the issue is now *res judicata*.

[26] Learned judge also held that the letters and related communications are implied decisions that placed Genting at risk of prosecution under the ITA 1967 or the PDPA 2010. The DGIR's reliance on these letters to demand customer data confirmed their status as decisions. Additionally, the learned judge also held that expressions of views, opinions, or statements could qualify as decisions for the purposes of judicial review.

Against DGIR

[27] As against DGIR, there are two distinct orders against two different sets of decisions:

(i) the learned judge had quashed DGIR's decision, communicated in an email dated 12 November 2019 to Genting, which conveyed the DPDP decision and declared the same to be invalid and unlawful; and

(ii) the learned judge had also declared that DGIR's requests, made through letters and emails dated 23 November 2018, 8 April 2019, 29 April 2019, 17 May 2019, 12 December 2018, and 12 November 2019, for Genting to disclose customers' personal data to be invalid.

[28] The other prayers are declaratory orders on the interpretation of the ITA 1967 and the PDPA 2010, a prohibitory order to injunct LHDN from exercising its statutory duties under the ITA 1967 and a declaration that the customers' information or personal data, which are protected by privacy laws in other jurisdictions, cannot be disclosed without their consent unless the same falls under the ITA 1967 or based on an order of the court that requires disclosure.

[29] The learned judge also held that the DGIR's attempt to seize the customer database without evidence of specific wrongdoing violated the right to privacy, which is protected under art. 5(1) of the Federal Constitution.

[30] The learned judge also held that ss. 80 and 81 of the ITA 1967, granting the DGIR broad powers to request information, are general provisions that have remained largely unchanged since 1967. In contrast, the PDPA, which was enacted in 2010, is a specific statute designed to protect personal data. Applying the legal principle *generalia specialibus non derogant*, the learned judge held that specific provisions in the PDPA 2010 on personal data protection take precedence over the general provisions of the ITA 1967, including s. 81.

[31] The learned judge also held that for the DGIR had failed to establish that the disclosure of Genting's customers' personal data was necessary for crime detection or investigations. Instead, their requests were broadly justified as part of efforts to increase tax collection, which did not meet the required standard under s. 81 of the ITA 1967.

[32] The learned judge concluded that both DGIR and the Commissioners have violated the ITA 1967, the PDPA 2010 and Federal Constitution, by acting beyond their statutory powers. The DGIR had used the ITA 1967 to improperly access protected information and conducted a fishing expedition under vague and sweeping justifications. The Commissioner and Deputy Commissioner have failed in their duties as regulators under the PDPA 2010 by enabling these actions, neglecting to uphold personal data protections and the right to privacy guaranteed under the Federal Constitution.

Our Decision

[33] Before this court, the DGIR has raised four issues:

(i) whether the DGIR's email dated 12 November 2019 was a decision;

(ii) whether the judicial review application was filed out of time;

(iii) whether the personal data requested by DGIR falls within s. 81 of the ITA 1967; and

(iv) whether the disclosure of the personal data to DGIR under s. 81 of the ITA 1967 would be in breach of the provisions of the PDPA 2010.

Issue (i) Whether The DGIR's Email Dated 12 November 2019 Is A Decision

[34] The DGIR's "decision" which Genting sought to impugn, reads as follows:

> Good Afternoon Mr Wong Kok Loon,
>
> Attached here is the letter from Jabatan Perlindungan Data Peribadi (JPDP) for Genting Malaysia Berhad.
>
> For more information please don't hesitate to contact me as per the number below.
>
> Thank you for your co-operation.
>
> "Berkhidmat Untuk Negara "
>
> "Bersama Membangun Negara"
>
> Sgd.
>
> (Abdul Rahman Sani Bin Neranjen Singh)
> Penolong Pengarah
> Bahagian Profiling Jabatan Perisikan & Profiling
> Lembaga Hasil Dalam Negeri Malaysia

[35] The first issue is whether the DGIR's email dated 12 November 2019, which Genting sought to impugn, is a decision that is reviewable under O. 53 r. 2(4) of the ROC 2012 which reads:

> Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

[36] It is imperative that the 'decision' be first identified and the identified decision must be correct. In this regard, it is instructive to refer to the decision of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, where the duty to identify the impugned decision was stated as follows:

> Identifying the Impugned Decision.
>
> It is right to say, at the risk of being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and, of course, of the decision itself. *It is therefore a matter of the first importance to correctly identify the decision sought to be impugned. Furthermore, when the date on which a decision is made is important, it may be necessary to know which of a series of acts constituted the effective decision for the purpose of the scheme in question*. The same is true where statute allows an appeal to be brought from a decision. Failure to observe these basic requirements could have fatal consequences as the following authorities will serve to illustrate ... (emphasis added)

[37] The next issue is what amounts to a decision that is subject to review under O. 53 of the ROC 2012.

[38] In *Council Of Civil Service Union & Ors v. Minister For The Civil Service* [1985] AC 374, the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision-maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[39] The case of *CCSU* (*supra*) was applied by our apex court in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805, where the Federal Court held as follows:

> [26] It is trite law that the purpose of an order for *certiorari* is to quash the legal effect of a decision. In England, in the case of *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.
>
> [27] We adopt the same view. *Under the scheme of O. 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review*. In the present case, there is no dispute that the Commission is a public authority. But we are of the view that the Commission is not a decision making body. *A closer look at the Commission's report will reveal that the Commission does not make legal decision*. The report consists of findings and recommendations of the Commission on the five Terms of Reference entrusted upon them to do. Being mere findings and recommendations, it do not bind the respondents, not even the Government.
>
> (emphasis added)

[40] The above decision of the Federal Court was applied by this court in a tax case, *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197, where this court held as follows:

> [9] It is a principle which remains a good and trite law that *certiorari* will lie to quash a decision which has already been made by a public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of the decision of the public authority (see *Malaysian Court Practice* (2007) Desk Ed) at p 670). *For a decision to be quashed on judicial review or susceptible to the court's reviewing powers, there must first be a decision by a decision maker, and that decision must affect the aggrieved party by either altering the rights or obligations or depriving him of the benefits which he has been permitted to enjoy* (*Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ

805; [2011] 6 MLJ 490; *Council of Civil Service Union & Ors v. Minister for Civil Service* [1984] 3 All ER 935). *Clearly, the law we apprehend ... there must first be shown that a requisite decision by the appellant as a public authority had been made before the application could come within the bounds of O. 53 of the ROC 2012.* It is therefore open to the appellant to argue and for this court to hold, based on this principle, that *certiorari* will not lie to quash a decision if no such decision has been made by the public authority. This was the decisive point at issue that was canvassed before this court.

(emphasis added)

[41] Therefore, in order to invoke the judicial review powers of the court under O. 53 r. 2(4) of the ROC 2012, there must first be a decision by a decision maker (DGIR) or a refusal by him to make a decision, and, that decision must affect the aggrieved party (Genting) by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[42] In the present appeal, the email that Genting was seeking to impugn is an email that was merely enclosing or forwarding a letter from the DPDP for the knowledge of Genting. In fact, the letter from DPDP was in response to the DGIR's letter issued at the behest of Genting. Genting had, *via* a letter dated 24 September 2019 emailed DGIR, agreed for the matter be referred to the DPDP. After agreeing for the matter to be referred to DPDP, and having seen that DPDP's legal opinion is not in their favour, Genting now sought to quash the opinion of DPDP *via* their letters dated 8 November 2019 and 29 January 2020, respectively.

[43] We are therefore of the considered opinion that by no stretch of imagination can this forwarding email be a decision that is reviewable under O. 53 of the ROC 2012. Bearing in mind that the email is merely forwarding the letter from DPDP, the said email does not in any way affect Genting, by either altering their rights or obligations or depriving them of the benefits which they have been permitted to enjoy. As such, the said email is not a decision that can be the subject of review under O. 53 r. 2(4) of the ROC 2012.

[44] This case is similar to the decision of the High Court in *Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2016] CLJU 1798; [2016] 1 LNS 1798 (which had been affirmed by this court in Rayuan Sivil No. W-01(A)-187-05/2016). In that case, the High Court has decided that the letter issued by the DGIR to the taxpayer in a letter informing of the status of the audit conducted by the DGIR is not a decision that is reviewable under O. 53. The learned judge held as follows:

20. A perusal of the Impugned letter at paragraph 2 showed that the Respondent had not issued the notice of assessment for years of assessment 2004 to 2006. Note the words used "Adalah dimaklumkan yang notis taksiran bagi Tahun-Tahun Taksiran 2004 hingga 2006 yang

akan dibangkitkan terhadap tuan adalah selaras dengan kuasa Ketua Pengarah Hasil Dalam Negeri (KPHDN) di bawah seksyen 140(2) Akta Cukai Pendapatan 1967 (ACP).

...

24. *It is obvious that in the case of the Applicant, the said Impugned Letter had not affected their rights as it was merely a letter informing the applicant of the status of the audit conducted by the officers of the Respondent*. In the event the Applicant chose not to respond to the Impugned Letter, the Respondent will not be able to enforce against the Applicant.

...

27. The *Applicant's JR Application was prematurely filed as the Impugned Letter was not final and conclusive but merely a finding made by the audit during the audit's visit and based on the information and the documentations furnished to the audit by the Applicant. Therefore, there was no decision, omission or action which had adversely affected the applicant within the context of Order 53 Rule 2(4) of the ROC 2012 at the point the Impugned Letter was sent and received by the Applicant*.

(emphasis added)

[45] Since there is no decision that can be the subject of review, we are of the considered opinion that the learned judge has committed an appealable error in quashing the notification email issued by the DGIR. In *Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 5 CLJ 153, this court made a finding that the appeal should be dismissed on the basis that there is no decision that is amenable to judicial review. At p. 165, this court held that:

[22] Apart from the reason as prognosed above, this appeal could also be dismissed on the ground that the judicial review application by the appellant merely served to fragment the decision-making process and hence premature. *We were not convinced that a 'decision' existed here that was amenable to judicial review in the context of judicial or administrative proceedings. The decision of the first respondent could not be said to have effectively disposed of the matter whereby its decision was final and determinative of the issue under consideration*.

(emphasis added)

[46] However, the learned judge held that the issue of whether the impugn letter constitutes a reviewable decision is *res judicata*. This is because, at the leave stage, the Attorney General's Chambers (AGC) had objected to the leave application on the basis that the impugn letters were not decisions but merely "views". However, the court has granted leave for judicial review, and since there is no appeal by the AGC or an application to set aside the decision to grant was filed by the DGIR or the Commissioner/Deputy Commissioner of JDPD, the matter is now *res judicata*.

[47] However, from the judgment of the learned judge, we find that the letters that were the subject matter of the AGC's objection at leave stage are in respect of the PPDP's letters dated 8 November 2019 and 20 January 2020. The issue of whether the DGIR's email constitutes a decision that falls within the ambit of O. 53 of the ROC 2012 was not an issue in the leave application. This is what the learned judge held on the issue of *res judicata*:

> [35] *The first question raised by the respondents is whether there is a 'decision' by them that is amenable for judicial review which is final and determinative of the issue under consideration*. It is the contention of the respondents that the decision upon which the applicant has sought for judicial review on are the *letters of the Deputy Commissioners dated 8 November 2019 and 20 January 2020 (the "letters") and that both letters do not in any manner or under any circumstances constitute 'decision' within the ambit of O. 53 r. 2(4) of the Rules of Court 2012 ("ROC")*.
>
> [36] On this issue, this court finds that at this stage, the question of whether there is a decision in this matter is *res judicata*. The *argument that the Commissioner and Deputy Commissioner's letters of 8 November 2019 and 29 January 2020 are not decisions but merely their "views" was raised by the Attorney General's Chambers ("AGC") on behalf of the Commissioner and Deputy Commissioner and ventilated at the leave stage of these proceedings*. The court had allowed leave for judicial review against the Commissioner and Deputy Commissioner on the basis that the letters were, in fact, a decision and that the applicant was aggrieved with the same. No appeal was filed by the AGC and the Commissioner and/or the Deputy Commissioner. In the event the Commissioner/Deputy Commissioners were of the view that leave ought not to have been granted by the High Court, they ought to have filed a setting aside application against the decision of this court (see *Orange Rederiet Aps v. Ketua Pengarah Hasil Dalam Negeri* [2018] CLJU 384; [2018] 1 LNS 384; [2018] MLJU 218).
>
> [37] In re-litigating the issue at this stage, the respondents are inviting the court to act in a manner that would be functus officio by altering a decision that the court has already made in granting leave to review a decision that where the applicant is aggrieved or adversely affected. The only question before this court at this stage is whether the judicial review ought to be granted on the merits.
>
> (emphasis added)

[48] Therefore, the issue of whether the DGIR's email amounts to a decision that is reviewable under O. 53 of the ROC 2012 is not *res judicata* as this issue was not raised during the leave stage.

[49] In any event, the learned judge has made a legal error by failing to adhere to the binding precedent set by the Federal Court in the case of *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861. In this case, the Federal Court held that since the putative respondent was not served with the cause papers for the leave application, which was heard *ex parte* (with or without the presence of AGC), the putative respondent cannot be barred and estopped from raising preliminary objections. The court held as follows:

A [125] Question 5 and Question 6 relate to the appellant's complaint that preliminary objections by the respondents should not be made at the hearing of the appeal at the Court of Appeal when leave to commence judicial review had been granted and the substantive judicial review application had been disposed of by the High Court. *The appellant argued that the preliminary objections should have been raised at the leave stage at the High*
B *Court and the respondents are barred and estopped from raising such preliminary objections. The appellant further contended that the first respondent had conceded to such leave being granted by the High Court; and therefore are deemed to have waived its rights to make any preliminary objection in the Court of Appeal.*

[126] We cannot agree with the appellant on this point. *At the leave stage,*
C *the application was made by the appellant ex parte. Both the first and second respondents were not present in court as they were not served yet with all the relevant documents*. Obviously, the respondents cannot be expected to raise any preliminary objection at the leave stage. *Therefore, the question that the respondents were barred and estopped from raising such preliminary objections alter leave has been granted does not arise*. The first appearance by both the
D respondents in the application was when the application proper was heard *inter partes*. That is the first and the earliest opportunity for them to appear and to raise the preliminary objections. There is nothing irregular about that.

...

E [130] The position is thus clear that the officer from the Attorney General's Chambers who attended court at the leave stage did not represent the first respondent, nor the second respondent. *Therefore, both the first and second respondents cannot be barred and estopped from raising the preliminary objections at the inter partes hearing of the substantive application after*
F *leave had been granted. The question whether they had waived their rights to raise the preliminary objections does not arise*.

(emphasis added)

[50] Therefore, since the DGIR was not a party during the leave application, the DGIR cannot be estopped from raising the issue of whether
G the email dated 12 November 2019 is a reviewable decision at the *inter partes* hearing of the substantive application.

Issue (ii) Whether The JR Application Was Filed Out Of Time

[51] The learned judge has also declared that DGIR's requests, made through letters and emails dated 23 November 2018, 8 April 2019, 29 April
H 2019, 17 May 2019, 12 December 2018, and 12 November 2019, for getting to disclose customers' personal data to be invalid.

[52] In respect of these letters dated 2018 and 2019, it is the submission of DGIR that Genting's dispute arose from the DGIR's request for
I information, which transpired as early as 2018 when the DGIR had requested for Genting customers' personal data for the years 2016 and 2017. However, that request in 2018 had been overtaken by the second request on

24 May 2019 when DGIR requested for information for the year 2018. Hence, the DGIR submitted that the "decision" under attack ought to be the request for information *via* the DGIR's letter dated 17 May 2019. Since the application for judicial review was only filed on 7 February 2020, the application is clearly outside the time provided under O. 53 of the ROC 2012.

[53] It is to be noted that learned counsel for Genting had conceded in para. (33) of their written submission dated 11 July 2023/encl. (39), that the DGIR's communication letters dated 23 November 2018, 29 April 2019 or 17 May 2019 cannot be decisions which are amenable to judicial review because they are nothing more than "requests" which Genting had responded to deny such requests:

> 33. The *Respondent submits the Revenue's Communications cannot be decisions which are amenable to judicial review because they are nothing more than "requests"* which the Respondent had replied to in denying the requests. *A request cannot be tantamount to a decision which is amenable to judicial review.*
>
> (emphasis added)

[54] On this, we agree with Genting that a request cannot tantamount to a decision which is amenable to judicial review. Since the impugn letters issued in 2018 and 2019 are merely 'request' letters, the said letters are not decisions which are amenable to judicial review.

[55] In any event, the learned judge has granted declaratory orders that all the letters dated 2018 and 2019 are null and void. The issue then is whether the granting of declaratory orders is at large or are they also limited to the time frame provided under O. 53 r. 3(6), ROC 2012, which reads:

> (6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[56] A prayer for declaration in a judicial review application is provided in O. 53 r. 2(2), ROC 2012, which reads:

> (2) An application for judicial review may seek any of the reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

[57] In the present appeal, even if we are to take the latest request for the customers' information by the DGIR, it would be the DGIR's letter dated 17 May 2019. The learned judge has clearly committed an error in granting the declaratory orders to nullify letters issued by the DGIR way back in 2018. It must be emphasised that O. 53 r. 3(6) clearly provides that the application for judicial review shall be made promptly and in any event within three months from the grounds of application first arose or when the decision is first communicated to the applicant.

[58] Order 53 r. 3(6) therefore applies to all prayers in the judicial review application, whether they are for *certiorari* or declarations. Therefore, the prayers for declarations are also limited to the time frame stipulated in O. 53 r. 3(6).

[59] In the present appeal, since Genting was seeking to nullify the letters issued by the DGIR in the years 2018 and 2019, and the latest letter is dated 13 May 2019, these letters are clearly issued more than three months from the date of the judicial review application, which was filed on 7 February 2020.

[60] In *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168, the Federal Court held as follows:

> In our view the whole issue is clearly one of jurisdiction. In the event only the first consideration of the Judge is relevant. Since the Judge rejected the explanation for the delay it follows that the Court had no jurisdiction to hear the application for leave for an order of *certiorari*. Whether the application for an order of *certiorari* had merits or not was irrelevant. This principle is implicit in *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower* [1983] CLJ Rep 266; [1983] 2 CLJ 7; [1983] 2 MLJ 54. There had been no jurisdiction to hear the application for *certiorari* because Order 53 Rule 1A of the Rules of the High Court 1980 expressly directs that leave shall not be granted "unless the application is made within six weeks after the date of the proceeding".

[61] The above principles in *Mersing Omnibus* and *Ravindran* have been reaffirmed by the Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193, where the Federal Court held as follows:

> [30] In conclusion, we are of the view that **the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction** and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant. (emphasis added)

[62] In the case of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 1 MLRA 325; [2010] 4 MLJ 360, it was stated by the Court of Appeal as follows:

> [16] The High Court in its judgment was of the view that the 40 days specified under O. 53 r. 3(6) was not rigid. I am of the view the judge erred in ruling that the time frame prescribed by the rules is not rigid. **I am in agreement with the appellant's counsel that compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction** (See *Mersing Omnibus Co. Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266).
>
> ...

> [60] It is imperative that an application for judicial review is made within time (*Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473). Three recent authorities illustrate how those prescribed 40 days had been calculated. In *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698, it was held that the material date from which the 40 days was to be calculated was the date when Bursa resisted attempts by GBA to preclude the Listing Committee from partaking in deliberations. In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805, it was held that the application had to be made within 40 days from when the decision was communicated to the applicant. And in *TR Rumah Lampoh Dana & Ors v. Government of Sarawak* [2005] 8 CLJ 705, it was in effect held that any application for judicial review had to be made within 40 days from the date of gazette of the Direction.
>
> (emphasis added)

[63] We are of the considered opinion that the learned judge has clearly fell into error as she failed to consider that the issue on time frame to apply for judicial review prescribed in O. 53 r. 3(6) of the ROC 2012 goes to jurisdiction and a jurisdictional challenge can be made at any stage of the proceedings.

[64] In *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153, the Federal Court held that a jurisdictional challenge can be made at any stage of the proceeding. Where no jurisdiction exists, the suit is not competently brought and the court therefore has no power to take one more step. In other words, the court is not perfectly competent to entertain and try the suit. Jurisdiction does not originate in consent or acquiescence of parties and cannot be established, where it is absent, by such consent, acquiescence or waiver of rights.

[65] Therefore, the fact that Genting had obtained leave to commence this judicial review application does not preclude the DGIR from raising the jurisdictional issues, as jurisdictional challenge can be made at any stage of the proceedings, as per the Federal Court in *Asia Pacific* (*supra*).

[66] A similar position was taken by the Federal Court in *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* (*supra*), where the apex court held as follows:

> [131] The first preliminary objection under O. 53 r. 3(6) of the RHC 1980 relates to the question jurisdiction of the court. If the objection is allowed, then the High Court has no jurisdiction to hear the judicial review application and leave should not have been granted in the first place. Consequently, the High Court should not have proceeded to hear the substantive application on merit. In the present case, the High Court has no jurisdiction to grant leave as prayed for by the appellant as it is the cardinal principle of law that the court cannot confer jurisdiction upon itself when none exists ...

A [132] Therefore, the respondents are at liberty to raise the preliminary objections when the case came up for appeal at the Court of Appeal particularly when the High Court Judge failed to consider their objections earlier. There is no legal impediment for that. The Court of Appeal was right in hearing the preliminary objections and subsequently dismissing the appeal after allowing the objections.

B Conclusion

[134] In the result, for all the reasons given above, *we hold that the judicial review application by the appellant was filed outside the stipulated 40 days' time frame provided for by O. 53 r. 3(6) of the RHC 1980 (the applicable provisions then).* The 40 days period started to run from the date when the decision of the C State Authority to acquire the appellant's land in question was first communicated to the appellant when Form E together with the schedule attached thereto was served on the appellant on 7 March 2006. *Since the judicial review application was only filed by the appellant on 6 January 2008, it was clearly outside the stipulated 40 days period. Therefore, the High Court has no* D *jurisdiction to grant leave and to hear the substantive judicial review applications; and the application must be dismissed in limine.*

[135] Therefore, the first preliminary objection is allowed and upheld. It is not necessary to deal with the second preliminary objection and the merits of the substantive application. We have also dealt with all the questions posed before us for determination in this judgment.

E (emphasis added)

[67] In the present appeal, as Genting had filed the judicial review application on 7 February 2020, it was clearly beyond the prescribed three-months period prescribed by O. 53 of the ROC 2012. Consequently, the F learned judge has no jurisdiction to grant leave or to hear the substantive judicial review applications, and the application should have been dismissed *in limine*.

Conclusion

[68] Since issues (i) and (ii) are issues that goes to jurisdiction, that the G email dated 12 November 2019 is not decision that can be the subject of judicial review and the letters that were nullified by the learned judge were challenged outside the time stipulated under O. 53 r. 3(6) of the ROC 2012, we are of the considered opinion that the learned judge has erred in her finding that warrants our appellate intervention.

H **[69]** In view of our decision on issues (i) and (ii), there is no necessity for us to consider issues (iii) and (iv).

[70] For the reasons enumerated above, we allow the appeal with costs and set aside the decision of the learned judge against the DGIR.

I